In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1557

NACHMAN CORPORATION,

Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Nachman Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 23, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the United States District Court for the Northern District of Illinois, which was reversed by the Court of Appeals, appears at 436 F.Supp 1334.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 23, 1979. Jurisdiction of the courts below was based upon 28 U.S.C. §§1331 and 1339, and 29 U.S.C. §1302(b). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the retroactive application of ERISA (as hereinafter defined) to compel employer liability under a lawfully terminated pension plan which did not provide for continued funding in excess of the plan's assets on termination violates the due process clause of the fifth amendment to the United States Constitution.

2. Whether an employer, which lawfully terminated a pension plan prior to the effective date of the minimum vesting and funding standards imposed by ERISA, is compelled to continue to fund the pension plan to provide payments to participants for which the employer was not contractually liable.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "

United States Code, Title 26

§401(a)(7) [prior to amendment by ERISA]

"(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable."

United States Code, Title 29

§1002(19)

"For purposes of this subchapter:

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title."

§1053(a)

"(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions. . ."

§1061(b)(2)

"(2) Except as otherwise provided in subsections (c) and (d) of this section in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975."

§1082(b)(3)

"(3) For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years."

§1086(b)

"(b) Except as otherwise provided in subsections (c) and (d) of this section, in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975."

§1322(a)

"(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it."

STATEMENT OF THE CASE

This declaratory judgment action[1] arises from the determination by respondent Pension Benefit Guaranty Corporation ("PBGC") that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. ("ERISA") compels petitioner Nachman Corporation ("Nachman") to continue to fund a lawfully terminated collectively bargained pension plan despite an express limitation of Nachman's liability to the Plan.

The Plan at issue (the "Nachman Plan") was established in 1960 pursuant to a collective bargaining agreement between Nachman and the International Union, United Automobile Aerospace & Agricultural Implement Workers of America (the "UAW"), which provided that Nachman

[1] Nachman filed a declaratory judgment action against the PBGC alone. The UAW subsequently intervened as a defendant. The case was decided on cross motions for summary judgment.

would contribute to a pension plan a certain number of cents per hour worked for each employee. Under the Plan, Nachman's obligation to make annual contributions to a trust fund was translated into an actuarial formula calculated so that the benefits under the Plan would be fully funded after 30 years if the Plan had not terminated.[2] As acknowledged by the Seventh Circuit, "The parties do not dispute that Nachman complied fully with the funding obligations imposed by the Plan."[3]

The Nachman Plan expressly provided that benefits were payable to participants only if the funds contributed by Nachman and the accumulated earnings thereon were adequate to pay all such benefits:

> "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the Company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid."[4]

Under its terms, the Plan could be terminated at any time after the collective bargaining agreement expired. The Plan also provided that upon termination, the contributions previously made by Nachman constituted a "complete discharge of the Company's financial obligation."[5]

Prior to ERISA, the applicable provisions of the Internal Revenue Code and Illinois law permitted an employer such as Nachman to terminate a plan and cease contributing. Benefits would then be paid to participants from the funds

[2] Joint Appendix, pp. 15-21.

[3] Slip Opinion, Appendix p. 2.

[4] Article V, §3 of the Plan, Joint Appendix, p. 39.

[5] Article V, §5 of the Plan, Joint Appendix, p. 37.

already contributed and for which the employer received a deduction on its income tax return. ERISA established a number of requirements for plans to provide truly "nonforfeitable" benefits, i.e., certain benefits could not be forfeited due to early termination of employment, or plan termination, and minimum funding obligations must be undertaken by the employer. ERISA did not, however, require a plan to provide these nonforfeitable benefits upon its enactment in 1974. Instead, the requirement to provide nonforfeitable benefits was phased in to allow employers time to plan appropriate courses of action to deal with the requirements of the new Act. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978) discussed at pp. 11-16, *infra*).

Thus, under Title I of ERISA, every plan such as the Nachman Plan was required to be amended by January 1, 1976 to provide that a participant's benefits become nonforfeitable after he completes a certain length of employment. 29 U.S.C. §§1053(a), 1061(b)(2). The first contribution to meet the new minimum funding requirements imposed by ERISA would have been for the year beginning January 1, 1976. 29 U.S.C. §§1082(b)(3), 1086(b).

Relying on this timetable, on October 1, 1975 Nachman, which was closing its plant, gave timely notice to the UAW that it was terminating the Plan effective December 31, 1975. Nachman could not have given such notice sooner because, under the provisions of the Nachman Plan, termination was not permitted during the term of the collective bargaining agreement which expired on October 31, 1975.[6] As the court below acknowledged, "The propriety of the termination is not challenged."[7]

[6] Article IX, §2 of the Plan, as amended by Amendment No. 3 to the Plan, Joint Appendix pp. 50, 76.

[7] Slip Opinion, Appendix p. 3.

The effect of such termination on Nachman, however, is indeed challenged. Although the parties and the court below conceded that Nachman *could not* have terminated the plan prior to October 31, 1975, and although Congress allowed a grace period to January 1, 1976 to amend such plans to provide that benefits become "nonforfeitable," the Seventh Circuit (reversing the District Court) found (1) that the benefits provided under the Plan, which were expressly conditioned upon sufficiency of Plan assets, were nonforfeitable under ERISA prior to 1976, and (2) that the express terms of the plan had been retroactively amended by ERISA to impose liability for continued funding where no such liability had previously existed, even though the Plan was properly terminated before 1976. The court further held that such an interpretation did not violate the due process clause of the fifth amendment.

The court held, first, that the definition of "nonforfeitable" contained in section 1002(19) of Title I of ERISA applies to the use of that term in Title IV, which governs the PBGC. This is important since Nachman's liability to the PBGC is limited only to the extent the Plan provides nonforfeitable benefits. A claim to benefits is "nonforfeitable" under section 1002(19) only if it "is unconditional, and . . . is legally enforceable against the plan." Although the finding that the section 1002(19) definition applies to Title IV was in accord with the position taken by the District Court and Nachman, the Court of Appeals held that the benefits at issue were "nonforfeitable" under that definition, despite the fact that those benefits were limited by express contract to the assets of the Nachman Plan at termination.

Moreover, the Court of Appeals held that such an interpretation did not offend due process despite the fact that it, (a) created new and expensive obligations on the employer

(which admittedly had complied with all its obligations), (b) ignored the express contractual limitation of liability which was the product of collective bargaining, and (c) imposed this new liability without any chance for the employer to have avoided it under the grace period provisions of ERISA.

REASONS FOR GRANTING THE WRIT

Introduction

The instant case meets three of the five requirements for review by this Court set forth in Supreme Court Rule 19(b). First, the ruling below squarely conflicts with applicable decisions of this Court which hold unconstitutional the retroactive imposition of liability to pay additional compensation for services already rendered and fully compensated. Further, the Seventh Circuit's rationale conflicts with that of the Second Circuit in interpreting the definitional section of ERISA at issue (section 1002(19)). Finally, the statutory issue presented—the definition of "nonforfeitable benefit"—constitutes a critical issue of federal law which should be settled by this Court since, (a) the PBGC insures, and employers are obligated to fund, only such "nonforfeitable benefits,"[8] (b) the issue directly affects at least 12,000 employees and their employers throughout the United States (including the 135 former employees of the plant closed by Nachman),[9] and (c) a uniform approach to this legislation generally is required to guide both the public and private sectors in administering retirement benefit funds which affect practically every working person in this country.

Petitioner contends that the Seventh Circuit's interpretation of ERISA was erroneous and constitutes a violation of the due process right of Nachman and other employers who lawfully terminated pension plans prior to the effective date of the minimum vesting and funding requirements.

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[8] 29 U.S.C. §1322 (a).

[9] Joint Appendix at 138.

I.

THE RULING BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT HOLDING THAT RETROACTIVE IMPOSITION OF LIABILITY IS UNCONSTITUTIONAL.

The Seventh Circuit, in holding that the benefits at issue were "nonforfeitable," concluded that the statute as so interpreted, although admittedly retroactive, did not violate due process. Thus, the court found that Nachman could constitutionally be held liable for continued funding although (a) Nachman had complied with all its obligations under the Plan, (b) Nachman could not have terminated the Plan before it did so, and take advantage of certain grace periods set forth in ERISA, (c) the Plan expressly limited benefits to its assets and limited Nachman's liability to accrued contributions at termination, and (d) the Plan was lawfully terminated prior to the date on which such plans had to be amended to provide for truly nonforfeitable benefits.

This holding directly conflicts with the decisions of this Court in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935),[10] and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).[11] In *Alton*, this Court held

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[10] Although the portion of the *Alton* opinion dealing with the commerce clause was overruled in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 230 n.9 (1948), the coordinate holding of *Alton* on the due process limitations imposed on Congress by the Constitution remains in effect and unaltered, as recognized by this Court in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 19, n.18 (1976).

[11] Although the latter case was decided under the Contract Clause, the court below properly noted that "the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause." Slip opinion, Appendix p. 21.

that Congressionally imposed liability (under the Railroad Retirement Act) requiring the payment of pension benefits based in part on employment prior to enactment of that Act violated due process. The Court rejected the government's argument that Congress, by imposing liability to fund pension benefits based in part on past services, was acting in the best interests of the nation and the railroad industry. The *Alton* Court, in language directly applicable to Nachman's situation, held that by requiring payment "for services long since rendered and fully compensated," Congress had deprived the employers—who had no opportunity to terminate their obligations or increase retroactively their charges to their customers—of property without due process. 295 U.S. at 354.

Similarly, in *Allied Structural Steel,* this Court struck down a Minnesota statute which imposed liability on employers who terminated pension plans for the payment of unfunded benefits to all employees who had worked at least ten years. That statute, the Court ruled, unconstitutionally created a "severe disruption of contractual expectations...." 438 U.S. at 247. Liability for benefits based on services already rendered was imposed on employers who terminated plans immediately after enactment of the Minnesota statute. This Court compared such an impermissible retroactive imposition of liability without an opportunity to avoid such liability to the "gradual applicability of grace periods" which it found were provided by ERISA. 438 U.S. at 247. The ruling of the court below in the instant case, however, effectively rejects the existence of such grace periods and denies Nachman the opportunity to take advantage of them.

The *Alton* and *Allied* cases, along with the numerous lower court decisions following them,[12] stand for the proposition that the Constitution forbids legislation which imposes a new liability on employers to pay additional compensation to its employees for work which has been fully performed and compensated. Further, the cases emphasize the suspect nature of retroactively applied obligations, and reject arguments seeking to justify such legislation on the ground that the legislatures were acting in the public interest.

In rejecting the applicability of the precedent established by this Court in the above cited cases, the Seventh Circuit, although acknowledging the retroactive effect of its interpretation, relied entirely on *Usery* v. *Turner Elkhorn Mining Co.,* 428 U. S. 1, (1976), where this Court upheld Congressional imposition of liability on coal industry employers to compensate employees suffering from black lung disease. That reliance is misplaced. The opinion in *Turner Elkhorn* carefully distinguished *Alton,* and held that retroactive benefits for black lung victims constituted compensation for essentially tortious injury, "to satisfy a specific need created by the dangerous conditions under which the former employee labored." *Alton,* on the other hand, involved an unconstitutional attempt to require increased pension compensation in the nature of additional salary. 428 U.S. at 19. In the instant case, the pension payments imposed

[12] *Fornaris* v. *Ridge Tool Co.,* 423 F.2d 563 (1st Cir. 1970), Rev'd. on other grounds, 400 U.S. 41 (1970); *Fisher & Porter de P.R., Inc.* v. *ITT Hammell-Dahl/Conoflow,* 369 F.Supp. 638 (D.P.R. 1974); *Standard Oil Co. of Louisiana* v. *Poterie,* 12 F.Supp. 100 (E.D. La. 1935).

by the Seventh Circuit are, without question, in the nature of additional salary, and bear no relation to compensation for tortious injury or similar conduct. Clearly, this case should be governed by the principles of *Alton*, and not by those of *Turner Elkhorn*.

Even if this Court were to conclude that the imposition of new liability for past service were permissible, due process requires that Nachman be given the opportunity to avoid that liability. The Court in *Allied*, in striking down the Minnesota statute, criticized its "sudden, totally unanticipated, and substantial retroactive obligation" imposed by the Minnesota statute, and compared it with the gradual applicability of the "[f]unding and vesting requirements [of ERISA which] were delayed for an additional year [to January 1, 1976]. 29 U.S.C. §§1086(b), 1016(b)(2)." 438 U.S. at 249, n.23.

The statutory interpretation of the Seventh Circuit unnecessarily nullifies the grace period emphasized by this Court in *Allied*, by imposing liability for benefits prior to the effective date of the mandatory vesting and funding provisions—a result which, like *Alton* and *Allied*, established a constitutionally impermissible retroactive alteration of employer obligations for additional pension benefits. In reaching its conclusion, the Seventh Circuit mentioned several tests which it believed might apply to the judicial scrutiny of ERISA, as interpreted by that court.[13] The court below concluded that the retroactive imposition of liability on Nachman did not violate due process, mainly

[13] Thus, the court below mentioned a "means-end rationality test" (at p. 21), as well as a comparative test requiring an examination of both the problem to be remedied and the "nature and scope of the burden imposed to remedy that problem." (Slip opinion at p. 23.)

because it found "ample evidence that Congress perceived a widespread problem of national importance." (Slip opinion p. 24.) That conclusion is fallacious, because the Seventh Circuit's analysis erroneously presumed that the entire effect of ERISA was being subjected to constitutional scrutiny. In fact, this litigation involves only those plans which terminated prior to the end of the grace period —the first date on which Congress mandated plan amendments to provide for truly nonforfeitable benefits.

Although Congress undoubtedly perceived a "widespread problem of national importance," Congress also, as noted by this Court in *Allied*, allowed phase-in grace periods during which employers could terminate plans without further liability. To hold, as did the court below, that ERISA allowed Nachman no opportunity to terminate its obligations during this grace period, squarely contradicts this Court's holding in *Allied*. Since Nachman terminated its Plan at the first opportunity, and admittedly complied with all of its obligations under the Plan, the entire constitutional rationale of the Seventh Circuit is invalid.

One further important point should be mentioned with respect to the holding of the court below on the constitutional question. The opinion dealt at some length with the issue of respective reliance by Nachman and its employees, concluding that the "employees' reliance interests in vested benefits outweigh the employer's reliance on prior funding." (Slip Opinion at 25.) That startling finding is contrary to the record that the benefits at issue were not promised under the terms of the Plan, but only as the Plan was later affected by ERISA. Moreover, this finding totally ignores the fact that the Nachman Plan was the product of collective bargaining by the employer and the employees, the latter acting through the UAW. Nachman agreed to

contribute a certain sum to the Plan each year during which the collective bargaining agreement was in effect and the UAW agreed that benefits would be limited to the amount of those contributions.

Thus, as this Court recognized in *Allied* (438 U.S. at 246, n.18), the employees clearly had no expectation of benefits which were not provided in the agreement, and thus no "reliance" on the receipt of such benefits. As the District Court held in this case, based on the record, "the advent of ERISA does nothing to disturb the contractual expectations of Nachman or its employees." 436 F.Supp. at 1339. Indeed, any discussion of reliance must be settled in favor of Nachman in light of its lack of any liability to continue funding under pre-ERISA law. Further, to hold that reliance by the employer on the provisions of a duly executed collective bargaining agreement are any less than those of the employees who entered into that agreement violates constitutional doctrine, the National Labor Relations Act, and common sense.

The decision below is constitutionally offensive, contradicts established precedent, and should be reviewed and reversed by this Court.

II.

THE RULING BELOW IS ERRONEOUS AND CREATES A CONFLICT OF RATIONALE AMONG THE CIRCUITS.

In the instant case, although the benefits at issue were expressly conditioned upon sufficiency of assets, the Seventh Circuit held that the benefits were "nonforfeitable" since the benefits were "vested," i.e., the participants had met the required length of service requirements. The Seventh Circuit concluded that since the terms "nonforfeitable" and

"vested" are used interchangeably in much of the legislative history regarding ERISA, the vested benefits under the Plan are nonforfeitable.[14] The Seventh Circuit failed to realize, however, that the terms "nonforfeitable" and "vested" became interchangeable only after all the provisions of ERISA —including the minimum funding and vesting requirements —became effective. Prior to such time, and under pre-ERISA law, vested benefits were nonforfeitable only to the extent funded. 26 U.S.C. §401(a)(7) [prior to amendment by ERISA].

Moreover, the Seventh Circuit decision directly conflicts with the rationale of the Second Circuit in *Riley v. MEBA Pension Trust,* 570 F.2d 406 (2nd Cir. 1977). In *Riley,* the Second Circuit found that a benefit that had vested by the time the employee terminated his employment was in fact forfeitable because it was subject to a condition subsequent— the benefit would be forfeited if the employee competed with his former employer.

Thus, in *Riley,* a "vested" benefit was "forfeitable." Although these two cases arise under different factual settings, the application of the Seventh Circuit's holding in the instant case to the facts of *Riley* would have, without question, resulted in a contrary ruling to that of the Second Circuit on the issue of interpretation of the same statutory provision, section 1002(19).[15] If the Riley plan had terminated before January 1, 1976, the Second Circuit would have held that the employee's vested benefit was not insured because it was forfeitable. The vesting of benefits in the Plan merely established that a participant who terminated his employment before

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[14] Slip Opinion, p. 9, quoting D. McGill, *Preservation of Pension Benefit Rights,* 6 (1972).

[15] The court in *Riley* went on to hold that although the benefit was forfeitable, the employee had not in fact breached the condition subsequent.

retirement age, but after his benefit vested, would still be entitled to receive benefits upon reaching retirement age, provided that assets in the fund were sufficient.

The Seventh Circuit's ruling also conflicts directly with the decision in *A-T-O v. PBGC,* 456 F.Supp. 545 (N.D. Ohio, 1978). In that case, as in the instant case, the employer had terminated a plan, which limited liability to the assets of the fund, prior to the January 1, 1976 effective date of the minimum vesting and funding requirements. The court held that, as it interpreted section 1002(19), the benefits so limited were not nonforfeitable until after that date and, after an extensive review of the legislative history, found that Congress specifically intended to impose the new vesting requirements prospectively, not retrospectively. 456 F.Supp. at 522. Counsel is informed that the *A-T-O* case has been appealed to the Fourth Circuit, but as of this date no opinion has been issued by the reviewing court.

The interpretive issue addressed by the various district courts and courts of appeals is critical to the administration of ERISA since the PBGC insures only nonforfeitable benefits. 29 U.S.C. §1322. Although the PBGC has contended that its own definition of nonforfeitable (29 CFR §2605.6(a)) should take precedence over section 1002(19) for purposes of Title IV, every reported decision dealing with the issue has rejected that position. Only the Seventh Circuit, however, has held that a benefit is nonforfeitable under section 1002 (19) prior to 1976, where liability to pay the benefit was expressly and lawfully limited to the assets of the fund at termination.

In *A-T-O* and the instant case, the lower courts drew extensively on legislative history to bolster their conclusions. Significantly, the Seventh Circuit reached a result diametrically opposite to that reached by the *A-T-O* court, relying on the same legislative history. (See Slip Opinion, pp. 11-13.) These published opinions not only cause confusion in the

manner of approaching the interpretation of ERISA, but cloud the ordinary meaning of the central term "nonforfeitable" which, of course, should govern absent a finding of ambiguity.[16]

The dictionary definition of nonforfeitable is clear: "not subject to forfeiture; cannot lose right to."[17] Since the benefits at issue are strictly limited to the Plan's assets at termination, those benefits clearly were—at least prior to 1976—not nonforfeitable under the common meaning of the term as used in section 1002(19). In short, the benefits were not "unconditional" or "legally enforceable against the Plan" prior to January 1, 1976, on which date plans then in existence were required to be amended to provide nonforfeitable benefits.

The different approaches and conclusions drawn with respect to the definition of nonforfeitable under ERISA require review by this Court.

III.

THIS CASE PRESENTS A CRITICAL ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Based upon the foregoing, the need for a uniform approach to the concept of nonforfeitability under ERISA becomes clear. The issue has been sharpened and reduced by the opinions of the lower courts in the instant case, by the Second Circuit in *Riley* and by the District Court (and soon by the Fourth Circuit) in *A-T-O*.

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[16] *U.S.* v. *Public Utilities Commission of Cal.*, 345 U.S. 295 (1953), *Martin* v. *Hunter's Lessee*, One Wheat (14 U.S.) 304 (1816).

[17] Oxford English Distionary; *See also*, Webster's New Collegiate Dictionary, Funk & Wagnall Standard Desk Dictionary.

To hold, as did the Seventh Circuit, that Congress allowed no grace period in retroactively imposing the new vesting and funding requirements of ERISA constitutes a violation of due process and a disregard for the legislation's phase-in provisions. Too many employees and employers are affected by the sweeping changes mandated by ERISA to allow such a decision to stand.

CONCLUSION

For the foregoing reasons, petitioner Nachman Corporation prays that this court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for purposes of reviewing and reversing the decision of that court.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 77-2146 and 77-2147

NACHMAN CORPORATION,

Plaintiff-Appellee,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76-C-2963—Abraham L. Marovitz, *Judge.*

ARGUED SEPTEMBER 26, 1978—DECIDED JANUARY 23, 1979

Before CUMMINGS, *Circuit Judge,* WISDOM, *Senior Circuit Judge,** and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* The Pension Benefit Guaranty Corporation and the United Auto Workers appeal from the district court order granting summary judgment in favor of the plaintiff, Nachman Corporation. The lower court granted declaratory relief, limiting Nachman's pension liability to the amounts accumulated in a pension plan trust fund.

* Senior Circuit Judge John Minor Wisdom, of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

APPENDIX

The collectively bargained pension plan contains a clause excluding employer liability by limiting the employees' recourse to the assets of the pension fund. The issue raised on appeal is whether the Employee Retirement Security Income Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975), supersedes the employer liability disclaimer and thereby imposes liability for the payment of vested benefits on an employer who, after September 2, 1974, terminates a covered pension plan with insufficient assets. Additionally, Nachman challenges the constitutionality of ERISA if construed to impose liability on employers for vested unfunded benefits. We hold that ERISA does subject the plaintiff to liability for the payment of unconditionally vested benefits effective September 2, 1974 and that this construction does not contravene the Due Process Clause of the Constitution. Accordingly, we reverse the judgment of the district court.

I.

Pursuant to collective bargaining with the UAW, in 1960 Nachman established a pension plan for certain employees at its Armitage Avenue facility in Chicago. The plan terms provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. This pension plan is characteristic of "defined-benefit" plans, promising a fixed monthly benefit level for each year of service. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated by reference to administrative costs of the fund, benefit liabilities accruing during the current plan year ("normal costs"), and the amounts necessary to amortize the past service liability over thirty years.[1] The parties do not dispute that Nachman complied fully with the funding obligations imposed by the plan.

[1] The plan credits an employee for years served prior to the establishment of the plan. "Past service liability" refers to the cost of paying monthly benefits for those years.

On October 1, 1975, Nachman gave timely notice to the UAW that it was terminating the pension plan effective December 31, 1975. The termination accompanied the closing of the Armitage Avenue facility, which had become unprofitable. The propriety of the termination is not challenged.

It is also undisputed that the assets in the trust fund are insufficient to pay all the vested benefits which accrued before December 31, 1975. Apparently the fund assets can provide only thirty-five percent of the accrued vested benefits. Under the terms of the plan, the employees' benefits would be reduced ratably. Nachman would not be obligated to assume liability for the unfunded benefits. Article V, section 3 of the plan provides:

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

Nachman brought an action for declaratory relief to determine whether ERISA would impose any liability on it for the vested, but unfunded, benefits. The district court granted summary judgment in Nachman's favor, holding that Congress did not intend until January 1, 1976, to subject employers to liability for unfunded benefits which they had disclaimed. Since Nachman terminated the pension plan prior to that date it was not found subject to statutory liability.

II.

In 1974 Congress passed the Employee Retirement Income Security Act (ERISA) in order to establish "minimum standards . . . assuring the equitable character of . . . [private pension] plans and their financial soundness." 29 U.S.C. § 1001(a). ERISA consists of four titles, each designed to correct different abuses perceived in the private pension system. Title I attacks the lack of

adequate "vesting" provisions in many plans. Before ERISA, for example, if a plan did not provide for vesting until retirement, an employee with 30 years of service could lose all rights in his pension benefits in the event that his employment was terminated prior to retirement. Title I establishes minimum vesting standards to ensure that after a certain length of service an employee's benefit rights would not be conditioned upon remaining in the service of his employer. Employers were required to amend the terms of their plans to reflect these minimum standards effective January 1, 1976. *Id.* at § 1053(a). A second area of difficulty was the inadequacy of the funding cycle used by many plans. To improve the fiscal soundness of these pension funds, Title II amends the Internal Revenue Code to require minimum funding. Title III imposes fiduciary responsibilities on the trustees of the pension funds and provides for greater information and disclosure to employee-participants. The final area of concern addressed by ERISA was the loss of employee benefits which resulted from plan terminations. In order to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds, Title IV establishes a system of termination insurance, effective September 2, 1974.

The mechanics of the insurance system established in Title IV control the resolution of this case. Congress created the Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor to administer the termination insurance program. The PBGC guarantees the payment of "nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when . . . this title applies to it." *Id.* at § 1322(a). Prior to the termination by an employer-sponsor of a covered pension plan, a notice of intent to terminate must be filed with the PBGC. *Id.* at § 1341(a). The PBGC then examines the plan and determines whether the assets of the fund are sufficient to pay all benefits guaranteed by the Act. If the assets are sufficient, termination proceeds. If, on the other hand, the PBGC is unable to determine that the assets are sufficient, a trustee is appointed and the guaranteed

benefits are then paid out from the trust assets and, if those are insufficient, from PBGC funds.[2] *Id.* at §§ 1341(c) & 1342(b).

When the PBGC guarantees benefits in excess of the fund assets, the act provides for recovery from the employer-sponsor. *Id.* at § 1362. The amount of the employer's liability is determined by the value of the "plan's benefits guaranteed under this subchapter on the date of termination" offset by the allocable assets of the trust fund. *Id.* at § 1362(b)(1). Liability, however, is limited to a maximum of thirty percent of the net worth of the employer. *Id.*

Nachman's potential liability to the PBGC depends upon whether the employees' vested benefits, unfunded at the date of termination, are "guaranteed" under Section 1322, that is, whether these benefits are "nonforfeitable . . . under the terms of a plan" and the plan termination occurred after the effective date of Title IV, September 2, 1974. If they are so guaranteed, the PBGC must provide them and assess liability against the employer.[3]

It is conceded that the benefits in issue were vested under the terms of the plan. Thus, the precise question before us is only whether the plan term limiting benefit

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[2] The PBGC funds are collected through premiums assessed against employer-sponsors and invested in various accounts. 29 U.S.C. §§ 1305-07.

[3] The district court suggested that although Nachman could not be liable to the PBGC for the payment of the benefits, the PBGC might nonetheless be required to provide those lost benefits to the employees. 436 F. Supp. at 1334. Nothing in the statutory language or history of the Act supports this conclusion. The measure of the PBGC's obligation to provide benefits and the measure of employer liability are identical under the Act; that measure is the amount of benefits "guaranteed." 29 U.S.C. §§ 1361-62. The effective date of both sections was September 2, 1974. *Id.* at § 1381(a). Furthermore, the act provides expressly for PBGC assumption of liability without recourse to the employer only for those terminations occurring between June 30, 1974 and September 2, 1974. *Id.* at § 1381(b).

rights to the assets of the fund rendered the rights forfeitable and thus not guaranteed.

Title IV does not provide a definition of "nonforfeitable." However, the word nonforfeitable is used in Title I, the "minimum vesting" sections, as well. Title I requires that after January 1, 1976, every plan must provide that benefits become "nonforfeitable" upon the satisfaction of the minimum eligibility requirements. *Id.* at § 1053(a). The term "nonforfeitable right" is defined for purposes of Title I in Section 1002(19) as

> a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

Another definition of nonforfeitable for the purposes of Title IV was promulgated by the PBGC as the administering agency. Benefits are nonforfeitable, and guaranteed, if

> on the date of termination of the plan *the participant has satisfied all of the conditions required of him* under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, or the completion of a required waiting period.

29 C.F.R. § 2605.6(a) (1977) (emphasis added). Nachman's employees have satisfied all conditions required of them. The benefits in issue are therefore clearly "nonforfeitable" if the PBGC definition is employed.[4]

The district court concluded that Nachman employees did not have nonforfeitable rights under the plan. Relying on the definition provided in Title I, the judge concluded that the employer liability exclusion clause in the plan rendered the employee rights both "conditional" and not "legally enforceable" and therefore forfeitable.

[4] The PBGC has relied on this definition in guaranteeing millions of dollars in unfunded benefits disclaimed by employers who terminated plans prior to January 1, 1976. More than 12,000 employees are receiving such benefits from the PBGC.

The court reasoned that since Title I requires that plans be amended to make benefits nonforfeitable, such exclusion clauses could not be operative after January 1, 1976, the effective date of that title. Since the Nachman plan was terminated before Title I took effect, however, the judge concluded the clause retained validity. The court found no contrary legislative intent, relying on the congressional purpose to delay the effective date of the minimum vesting requirements until January 1, 1976. Under the lower court reading of the Act, between September 2, 1974 (the effective date of Title IV) and January 1, 1976 (the effective date of Title I) the PBGC would only be authorized to guarantee benefits which had become vested and had not been disclaimed by the employer under the terms of the plan.

We conclude that ERISA was designed to insure benefits which were vested under the plan terms, without regard to liability exclusion clauses, effective September 2, 1974. Benefits which would only vest by mandate of Title I standards rather than prior plan terms would not be insured until 1976. Since the Nachman plan was terminated after 1974, and since the benefits had admittedly vested under the terms of the plan (without regard to Title I) we hold that Nachman is subject to liability under ERISA. 29 U.S.C. § 1362.[5]

III

We agree with the district court that the definition of "nonforfeitable" provided in Title I should govern the construction of that term's use in Title IV.[6] However

[5] We express no opinion on the amount of that liability. As noted, § 1362 contains a net worth limitation. In addition, the PBGC has the authority to defer § 1362 liability and to make special repayment arrangements. 29 U.S.C. § 1367.

[6] The defendants argue it should not since Title I specifically limits the definitional provisions to that subchapter. 29 U.S.C. § 1002. But we agree with the proposition cited by the lower court that: "[a]n earlier specific definition may properly color a subsequent use of the same words without redefinition." *Kent Mfg. Corp. v. Commissioner*, 288 F.2d 812, 815 (4th Cir. 1961).

unlike the district court, we conclude that the PBGC definition is consistent with the Title I definition. Although the district court's further construction is linguistically plausible, we conclude that the benefit rights of Nachman's employees fit within the Title I definition of "nonforfeitable." Reference to the legislative history and the fundamentals of pension plans in effect before the passage of ERISA illustrates beyond any doubt that the PBGC definition also reflects the construction of the Title I definition intended by Congress.

Under ordinary usage, it may seem illogical to conclude that the Nachman plan provides employees with nonforfeitable benefits when a clause in the plan expressly precludes recovery from the employer in the event the plan terminated with insufficient assets. It certainly appears to be a forfeiture. This is undoubtedly the "illogic" which led the district court below, and the district court in *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, ... F. Supp. ..... (N.D. Ohio 1978), to conclude the benefits were forfeitable. *But see In re Williamsport Milk Products Co., Inc.*, ... F. Supp. ..... (M.D. Pa. 1978). But as the Second Circuit recently stated in *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977), "the lower court fell victim to the not uncommon error of reading technical pension language as if it were ordinary English speech."

Notwithstanding the plausibility of the lower courts' construction of "nonforfeitable" another construction is also possible; and it is that construction which we believe to be the correct one. This construction, like the district court's, also derives from the three elements required for nonforfeitability under the Section 1002(19) definition: the "claim" to the benefits must "arise from the participant's service," it must be "unconditional" and it must be "legally enforceable against the *Plan*." (Emphasis added). The benefit claims in issue can be seen to satisfy all three elements. The claims arise from participant service. Second, although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires

only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable. Nor is their claim against the plan conditional. All conditions placed upon the participant such as age and length of service have been met. The PBGC definition interprets "unconditional" only as referring to those conditions placed on the participant and not to sufficiency of assets.[7] Satisfaction of the claim is dependent upon sufficient assets, but this should not be viewed as a condition on the claim. Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights:

> In a basic contradiction to the pure legal concept of vesting, the Benefit under a pension plan that is described as vested, is, in the usual case . . . contingent . . . upon survival . . . [and] upon the availability of assets in the plan. In principle, however, this is no different from some other types of vested property rights such as those embodied in bonds and promissory notes that may not be honored at maturity because of the financial condition of the promisor. In essence, therefore, the vesting of a pension benefit simply means that the realization of the benefit is no longer contingent upon the individual's remaining in the service of the employer to normal retirement age.

D. McGILL, PRESERVATION OF PENSION BENEFIT RIGHTS, 6 (1972). *See also* DEPARTMENTS OF TREASURY AND

[7] Some conditions on vested benefits related to requirements imposed on the participants might render the benefits forfeitable, at least until 1976 when Title I would invalidate such conditions. *See, e.g.*, the benefit rights in *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). In this case, the vesting was unconditional.

LABOR, STUDY OF PENSION PLAN TERMINATIONS 1972, 19 (1973).[8]

In sum, the definition instructs that nonforfeitability must be measured by the quantum of rights against the plan and without regard to rights against the employer. The liability exclusion clause is therefore irrelevant to a determination of nonforfeitability because it relates only to a claim the employee may have had against an entity other than the plan itself.

Not only does this construction more closely conform to the statute itself, but it is also the only construction substantially supported by the legislative history. Two facts from the legislative history are significant in this regard. First, there is ample evidence that Congress used "vested" and "nonforfeitable" interchangeably and understood the definition of "vest" to mean that benefits would "vest" upon the participant's fulfillment of plan requirements regardless of employer liability exclusion

[8] Prior definitions of nonforfeitable clarify the use of the term "unconditional." H. R. 2 as reported, defined a nonforfeitable pension benefit as a:

> legal claim obtained by a participant or his beneficiary to that part of an immediate or deferred pension benefit, which arises from the participant's service and is no longer contingent on continued service or any other obligation to the employer, sponsoring organization, or other party in interest.

H. R. 2, 93rd Cong., 1st Sess., § 3(19) (1973), reprinted in II LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974, 2251-52 (herein LEGISLATIVE HISTORY). *See also* S. 1557, 93rd Cong., 1st Sess., § 3(t) (1973), I LEGISLATIVE HISTORY at 285. Despite a wide variance in the definitions employed in various versions of the act, there is substantial evidence that the object of coverage in this regard never differed. Thus even though this language was replaced, the committee report accompanying H. R. 12906, the bill incorporating definitional language very similar to that eventually passed, clarifies that both definitions were designed to "requir[e] plans to insure unfunded vested . . . [liabilities up to the amounts insured by the Act]." II LEGISLATIVE HISTORY at 3346. *See also* note 10 *infra*.

clauses.[9] Second, the legislative history also shows that Congress enacted Title IV for the specific purpose of guaranteeing benefits that were lost because of employer liability exclusion clauses.

[9] The district court in *A-T-O, Inc. v. PBGC*, ... F. Supp. at ..... concluded that Congress "was aware of the distinction between 'vested' and 'nonforfeitable,'" concluding that "nonforfeitable" encompasses only those vested benefits not disclaimed by the employer. As discussed *infra*, we are convinced that Congress did not understand this to be a difference in the terms.

We find only one statement in the legislative history potentially supportive of this construction of the statute. The district court relied on the following passage in the conference report to conclude that Congress intended to insure only those unfunded, vested benefits for which the employer had assumed liability: "Under the conference substitute, vested retirement benefits guaranteed by the plan . . . are to be covered. . . ." III LEGISLATIVE HISTORY at 4635. The court concluded that if the plan did not guarantee the vested benefits Congress did not intend to guarantee those benefits (until Title I became effective).

Although the sheer weight of the contrary history probably precludes the district court's conclusion, a closer reading of the paragraph cited reveals the propriety of a different inference than that drawn by the A-T-O court. The sentence reports the conference bill resolution of an issue of what variety of vested benefits should be insured. The report explains that the House version of the bill insured only those benefits "required to be vested under the bills minimum vesting standards" while the Senate version insured all benefits which vested by reason of plan terms. We read the quoted sentence as merely explaining that the Senate version was adopted and that vested benefits "guaranteed" by the plan, rather than Title I, would be insured. Thus it is inappropriate to read the word "guarantee" so strictly in a context where limitation-of-liability issues were not under discussion.

There in fact never was a dispute between the bills on the desirability of protecting vested benefits without regard to employer liability exclusion clauses. Senator Williams explained that "the conference substitute, as did the House and Senate bills, establishes an insurance program to protect employees against the loss of vested benefits . . ." without any qualification that those vested benefits be recoverable from the employer under the plan.

(Footnote continued on following page)

Turning to the first important aspect of the legislative history—the interchangeability of Congressional use of the terms "vested" and "nonforfeitable"—it must be realized that "vested" had a clear meaning which determined the meaning of its corollary term, "nonforfeitable." It had been commonly understood that benefits would "vest" even when the plans contained employer liability exclusion clauses. *See McGill, supra* at 6. The Nachman plan itself is illustrative, providing for the "vesting" of benefits upon satisfaction of age and service requirements, despite the inclusion of the exculpatory clause in the plan. Thus the substitution of the word "vested" for the word "nonforfeitable" in the statutory language further clarifies that Title IV guarantees benefits not contractually guaranteed by the employer.

The definitional substitution is entirely appropriate. There is overwhelming evidence that the words vested and nonforfeitable were in fact used synonymously in this regard by Congress.[10] Even though the Act uses the

[9] *continued*

The district court in *Nachman*, on the other hand, apparently recognized that the words were used interchangeably throughout the Act, but nonetheless concluded that Congress used the word "vested" to describe unfunded benefit rights enforceable against the employer. We refuse to presume, without supporting legislative history, that Congress used this standard pension term to mean something other than its accepted definition. The legislative history, as discussed, indicates traditional usage of the term "vested."

[10] In fact, in the reported version of S.4 the word vested was used where the word nonforfeitable now appears. See S.4, 93rd Cong., 1st Sess., § 402(a) (1973), I LEGISLATIVE HISTORY at 389. The substitution of terms might be explained by reference to the testimony of members from the Department of Labor at the hearings. The Department testified in 1973 that "there is a problem of defining the accrued benefit which will be insured. . . . [W]e probably need to get some consistency between accrued benefits definition for purposes of Internal Revenue as well as for purposes of termination insurance." *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93rd Cong., 1st Sess., Part I at 437. Senator Bentsen responded

(Footnote continued on following page)

word "nonforfeitable," various committee reports as well as remarks of members invariably state that Title IV insures "vested" benefits.[11] During the hearings Senator Bentsen specifically stated that "[t]he risk we are talking about insuring is the vested interest of the participants." *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93d Cong., 1st Sess., Part I at 443 (1973). The words "nonforfeitable" and "vested" appear interchangeably in the dialogue of the history throughout all stages of the legislation.[12] For example, in discussing the minimum

[10] *continued*

with some interest in consistent definitions, although emphasizing it was vested benefits Congress intended to insure. *Id.* at 443. The Internal Revenue Code used the word "nonforfeitable," rather than "vested," in its regulation of plan terminations pre ERISA. *See* Treas. Reg. § 1.401-6 (1963).

Alternatively it is conceivable that "nonforfeitable" was preferred to "vested" to clarify that benefits guaranteed by Title IV must have vested unconditionally during the period before Title I's restrictions on vesting conditions went into effect. *See* note 7 *supra*.

Moreover, the committee reports reveal clearly that although the statutory language was altered, the intent remained constant. In S. 1179, the first Senate bill to use the term "nonforfeitable," the accompanying committee report explained that insured benefits were those "vested . . . under the plan." S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1094.

[11] The conference report on Title IV was explained as preventing the loss of "vested benefits." III LEGISLATIVE HISTORY at 4741 (1976) (remarks of Senator Williams). *See also* H. REP. NO. 93-533, II LEGISLATIVE HISTORY at 2349; S. REP. NO. 93-383, LEGISLATIVE HISTORY at 1094, 1149. *See also* the remarks of Representative Drinan, III LEGISLATIVE HISTORY at 3590 ("The Bill . . . would prevent anyone who has a vested pension benefit from losing benefits because of plan failure for any reason.").

[12] In one Senate Report reference is made to "vested (*i.e.*, nonforfeitable) rights." S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1112. Both House and Senate Reports refer to "the *term* 'nonforfeitable right' or 'vested right' " (Emphasis on the singular form added). H. REP. NO. 93-533, II LEGISLATIVE HISTORY at 2357, S. REP. NO. 93-127, I LEGISLATIVE HISTORY

(Footnote continued on following page)

funding standards the Senate Committee noted that the "presently vested [benefits] . . . represent the nonforfeitable rights of the employees." S. REP. No. 93-383, I LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT SECURITY INCOME ACT OF 1974 (hereinafter LEGISLATIVE HISTORY), at 1090. In another Senate Report it was explained that "[o]ne of the major private pension plan considerations centers around the concept of vesting. Vesting refers to the nonforfeitable right or interest which an employee acquires in the pension fund." S. REP. No. 93-127, I LEGISLATIVE HISTORY at 594.

The second significant aspect of the legislative history supporting our construction of "nonforfeitable" is even more direct: the purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers. We must note initially that construing ERISA, as did the court below, to cover only instances in which the employer assumed liability for incompletely funded plans would import so narrow a purpose to Congress as to make the enactment of Title IV almost meaningless.[13] Congress was certainly aware of the fact that the standard private pension plan prior to ERISA

[12] *continued*

at 602. Senator Williams explained the conference bill as assuring every employee the attainment of "nonforfeitable or 'vested'" rights in a pension. III LEGISLATIVE HISTORY at 4734. *See also* H.R. 462, 93d Cong., 1st Sess., § 3(26) (1973), II LEGISLATIVE HISTORY at 75, setting out the definition of "'nonforfeitable right' or 'vested right.'"

[13] Again the district court found that these benefits would have become insurable under Title I effective in 1976. Title I, however, would have no effect on this problem since it was only directed at ensuring unconditional vesting under the plan. As discussed *supra*, it has been traditionally true that benefits can be unconditionally vested and still unrecoverable because of asset deficiencies. Throughout the history it is emphasized that Title I requirements would not ensure the employee of actual receipt of vested benefits—only Title IV could do that. *See, e.g.*, S. REP. No. 93-383, I LEGISLATIVE HISTORY 1093-94.

disclaimed employer liability.[14] Additionally, under this construction the congressional urgency behind Title IV would reasonably have to be further narrowed to reach only the instances where the employer was *both* liable for plan deficiencies *and* insolvent. (Otherwise insurance would be generally unnecessary). There is no question that terminations often result because of some financial difficulty. However, the Treasury-Labor Study of pension plan terminations, on which Congress relied heavily, revealed that only three per cent of employees who suffered benefit losses in 1972 worked for employers with a net worth less than the employee benefit losses. DEPARTMENTS OF THE TREASURY AND LABOR, STUDY OF PENSION PLAN TERMINATIONS 1972, 61 (1973). Further, seventy-one percent of the employees who suffered losses were employed by a firm with a net worth of at least 1,000 times greater than the benefits lost. *Id.* Therefore Congress clearly perceived the employer liability exclusions as the source of the losses and the

[14] Both legislative and non-legislative sources confirm that the employer rarely assumed liability for underfunding of the plans pre-ERISA. SEE S. REP. No. 92-634, 92nd Cong., 2nd Sess. at 74 (1971), II LEGISLATIVE HISTORY at 3479 (remarks of Rep. Annunzio); II LEGISLATIVE HISTORY at 3388-89 (remarks of Rep. Erlenborn). *See also,* A STUDY OF THE TERMINATION OF UAW PENSION PLANS reprinted in *Hearings on H. R. 1269 before the Subcommittee on Labor of the House Committee on Education and Labor*, 92nd Cong., 1st Sess. at 164 (1972); GREENOUGH AND KING, PENSION PLANS AND PUBLIC POLICY 194 (1976); D. MCGILL, FULFILLING PENSION EXPECTATIONS 112, 240 (1962) (stating that "except for unusual situations, the employer is under no *legal* liability to monitize the benefits credited under a pension plan." (Emphasis in original).

Evidence in the record here suggests that 78 of the 136 plans terminated before January 1, 1976 contained limitation of liability clauses similar to the one in the Nachman plan, a figure representing a lower percentage than these sources suggest has been traditionally true. This evidence does not reveal however whether some of the terminated plans used various other forms of indirect disclaimers instead of the standard clause. *See* MCGILL, FULFILLING PENSION EXPECTATIONS, *supra*, at 88-89.

problem to be remedied.[15] As early as 1971, the Senate Subcommittee on Labor had concluded:

> The need for or desirability of insurance arises because of the numerous contingencies which can result in . . . termination. . . . Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make.

INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SUBCOMMITTEE ON LABOR, 92nd Cong., 2nd Sess., 74 (1971).

There is, however, no need to infer such a narrow purpose to Congress since in fact Congressional representatives definitely believed that Title IV of ERISA had been written to insure the benefits which employers had declined to guarantee. It was definitively stated during the floor debates in both the House and Senate, that the termination insurance, had it been in force in 1960, would have insured the vested benefit losses of the employees of the South Bend Studebaker plant. II LEGISLATIVE HISTORY at 1639 (Remarks of Senators Bentsen and Javits); III LEGISLATIVE HISTORY at 4694 (remarks of Rep. Brademas).[16] Those losses resulted because the plan disallowed recourse to the employer's assets.[17]

[15] This is further evident from the repeated expressions of intention to insure all the vested benefit losses reported by the 1972 Treasury-Labor Study. As noted, almost all of the losses reported involved solvent employers. II LEGISLATIVE HISTORY at 1635-36 (remarks of Sen. Bentsen).

[16] The Studebaker losses were of the greatest magnitude and were frequently cited as representative of the need for termination insurance, *see* S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1093-94, 1146-47; II LEGISLATIVE HISTORY at 1665-66 (remarks of Sen. Taft); II LEGISLATIVE HISTORY at 3373-74 (remarks of Rep. Brademas).

[17] *See* the remarks of Willard Solenburger, HEARINGS ON PRIVATE PENSION PLANS BEFORE THE SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECONOMIC COMMITTEE, 89th Cong., 2nd Sess., 126, 127 (April 27, 1966).

Therefore, it is beyond doubt that the vested benefits of Nachman's employees are guaranteed by Title IV. The lower court suggested that even if the benefits were guaranteed Nachman would not be liable. As discussed *supra*, Section 1362, subjecting employers to liability for all guaranteed benefits, prohibits this conclusion. Moreover, the legislative history confirms that Section 1362 was intended to impose liability on employers for the benefits they had disclaimed contractually. Although the primary concern of the legislature was to guarantee benefits to workers, it was determined that imposition of liability on the employer would be essential to prevent abuse.[18] Title IV was not merely a subrogation scheme as the district court suggested. It was recognized as imposition of the very liability employers had previously refused to assume.[19] Nowhere does this appear more clearly than in the remarks of the opponents of Title IV. Five Congressmen supported a bill to delete Title IV

[18] *See* S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1155; II LEGISLATIVE HISTORY at 1873 (remarks of Sen. Griffin); II LEGISLATIVE HISTORY at 3382 (remarks of Rep. Gaydos), stating that employer liability was necessary to "prevent a solvent employer from terminating a plan and transferring the amount of the unfunded vested liabilities to the [PBGC]. Absent this procedure the solvent employer would be able to renege on his agreement to contribute to the plan with impunity."

[19] *See* GREENOUGH, *supra* at 194:

> Until the 1974 act . . . the financial obligation of a pension trust was limited to the actual assets of the plan; there was no recourse beyond the limit for those to whom benefits had been promised but for whom the liability had been insufficiently funded. Under the new pension law, the gap between the employer and the pension plan has been bridged. If the PGBC has had to pay benefits to vested participants upon plan termination, employers are liable for reimbursing the insurance corporation for insurance benefits paid. . . .
>
> The new termination insurance provisions constitute a recognition in public policy that an employer who establishes a pension plan cannot thereafter isolate himself from the financial consequences of the promises made. The reform was long overdue.

(significantly not Title I) from the act because they objected to its intent to "change the contract of the employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." H. REP. NO. 93-533, II LEGISLATIVE HISTORY at 2387-88 (supplemental views of Representatives Quie, Ashbrook, Erlenborn, Eshleman and Hansen).[20] Congress provided that Title IV take effect on September 2, 1974, to ensure "prompt and effective protection." III LEGISLATIVE HISTORY at 4742 (remarks of Sen. Williams). Senator Williams explained the need for the September 2, 1974 effective date:

> Probably one of the most difficult problems confronted by the Congress was the selection of effective dates for the insurance program, and here both Senate and House conferees worked diligently to arrange a structure of effective dates that would bring the insurance protection generally into effect as quickly as possible. This was done in recognition of the fact that depressed economic conditions in certain regions created the possibility that a number of plans were in critical straits and were terminating or were likely to do so imminently. Lack of immediate protection for beneficiaries in these cases involved workers who had earned . . . pensions notwithstanding the new provisions of the bill which have a delayed effective date.

Id. at 4766. To hold that the unconditionally vested benefit rights of Nachman's employees are not insured under the Act would totally subvert the Congressional intent. Since the benefits are guaranteed under the Act, Nachman is subject to liability under Section 1362.

[20] *See* Representative Erlenborn's lengthy explanation of his opposition to this result during floor debates and the vocal disagreement of other members of the House. II LEGISLATIVE HISTORY at 3388-89, 3390, 3393, 3396, 3399-3400. *See also* Representative Annunzio's remarks in support of termination insurance on the grounds that "it is unconscionable that an employer is presently under no legal obligation to make good on his pension promise." II LEGISLATIVE HISTORY at 3479.

IV

Nachman argues that Congress cannot constitutionally impose retroactive liability for the payment of unfunded, vested benefits under the Due Process Clause. U.S. CONST. Amend. V. The Plaintiffs rest their claim of unconstitutionality principally on the Supreme Court's decisions in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935) and *Allied Structural Steel Co. v. Spannus*, 46 U.S.L.W. 4887 (June 28, 1978). The defendants argue that the liability imposed should be characterized as prospective, but that even if retroactive, this exercise of legislative power is reasonable and constitutional under the Supreme Court decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

The Supreme Court has confirmed that Congress has broad latitude to readjust the economic burdens of the private sector in furtherance of a public purpose. Only if Congress legislates to achieve its purpose in an "arbitrary and irrational way" is due process violated. *Usery v. Turner Elkhorn Mining Co., supra*, at 15; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 46 U.S.L.W. 4845, 4851 (June 27, 1978). *Turner Elkhorn Mining* also instructs however that it is not necessarily true that "what Congress can legislate prospectively it can legislate retrospectively," 428 U.S. at 16. Judicial scrutiny of a statute must therefore include an assessment of the rationality of the retroactive effects as a means to achieving the Congressional purpose.

Title IV of ERISA does affect Nachman retroactively. The defendants argue that since ERISA only requires employers to assume liability for pension benefits which become due upon terminations after the effective date of the Act, it assesses liability prospectively. This argument, however, relates only to the degree of retroactive impact. Although it is true that the statute applies only to prospective terminations, it also applies retrospectively to invalidate exclusion-of-liability clauses in pension plans agreed upon prior to ERISA. Thus to the extent that ERISA invalidates Nachman's otherwise valid acts which occurred prior to enactment, it is retroactive. *See*

generally Allied Structural Steel Co. v. Spannus, 46 U.S.L.W. 4887, 4891 (June 28, 1978).[21]

The Congressional purpose in enacting Title IV of ERISA was to protect employees from the loss of vested benefits when a pension plan terminates with insufficient funds.[22] Nachman does not argue that this end itself exceeds Congressional regulatory power. Instead, the specific question presented for review is whether the imposition of retroactive liability on employers is an arbitrary and irrational means of achieving this end.

The success of Nachman's position ultimately must rest on the applicability of several Supreme Court precedents. Recently, the Supreme Court in *Allied Structural Steel* invalidated a Minnesota statute assessing liability on employers for the payment of unfunded benefits upon the termination of a private pension plan. Upon termination, covered employers were required to purchase deferred annuities sufficient to provide full pensions to all employees who had worked at least ten years. *Allied Structural Steel Co.* terminated a pension plan after the effective date of the Act with insufficient funds. The plan provided benefits for employees retiring after having served the company for a prescribed period, in no case less than fifteen years, and contained an exclusion of liability clause. Nine of the eleven employees discharged did not have any vested pension rights under the plan since they had not fulfilled the minimum service requirements. However, these employees had been in the company's employ for ten years and were therefore entitled to benefits under the Minnesota statute.

The Supreme Court found the employer could not be held to the liability imposed by the statute. The Court reviewed the statutory scheme and found it constitutionally insufficient, concluding that the legislature

[21] To be wholly prospective, Title IV of ERISA would have to apply only to pension plans established after the effective date of the act. *See* Hochman, *"The Supreme Court and the Constitutionality of Retroactive Legislation,"* 73 HARV. L. REV.

[22] As discussed *supra*, this was the explicit Congressional purpose.

had made "no showing . . . that this severe disruption of contractural expectations was necessary to meet an important general social problem." 46 U.S.L.W. at 4891. Although decided under the Contract Clause, which is applicable only to state legislation, several authorities have suggested that the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause. *Allied Structural Steel Co. v. Spannus*, 46 U.S.L.W. at 4894, 4895 note 9 (dissenting opinion); *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32, 41 (1940); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 448 (1934). *See also Hochman, supra* note 19, at 695; Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852, 890-91 (1944). Both employ a means-end rationality test. However, since we are convinced that ERISA withstands the scrutiny employed under the Contract Clause cases, we need not decide whether the two clauses in fact impose identical restraints on legislative impairment of contracts.

A second Contract Clause case,[23] *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934), relied upon in *Allied Structural Steel Co.*, may also be cited as support for Nachman's position. In *Worthen*, the Court invalidated Arkansas legislation exempting all life insurance from creditor attachment. The debt was incurred, judgment was obtained, and the writ of garnishment was issued, prior to the enactment of the legislation. The Court held that this limitation upon the means of enforcing a contract impaired the obligation of contracts and therefore could be justified only if it was enacted "in order to meet public need because of a pressing public disaster" and was "limited by reasonable conditions appropriate to the emergency." *Id.* at 433. Applying these standards, the Court was unable to ascertain a public need sufficiently

[23] In another recent decision, *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court invalidated state legislation under the Contract Clause. The Court applied a more stringent level of scrutiny to a state's impairment of its own contracts than is required for laws impairing private contracts, 431 U.S. at 22-23, thus rendering it inapplicable to this case.

broad to justify an act containing "no limitations as to time, amount, circumstances, or need." 292 U.S. at 434.[24]

In *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), the Supreme Court invalidated under the Due Process Clause a federally imposed compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. The Act required employers to pay the cost of retirement pensions for all workers presently in their employ as well as for those workers who had terminated employment in the year prior to enactment. Whether the purpose of the legislation was viewed as a legislative effort to improve efficiency, safety or the retirement security of workers,[25] the Court found it was arbitrary to achieve these ends through the "imposition of liability to pay again for services long since rendered and fully compensated," 295 U.S. at 354, and violated Due Process.

The defendant, on the other hand, relies principally on the Supreme Court's decision in *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976). There the Court upheld Congressional imposition of liability on coal industry employers to compensate employees suffering from black lung disease. The challenged provision subjected employers to liability for injury to employees who had terminated employment prior to the effective date of the Act. The Court resolved that Due Process was satisfied because the legislation represented "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . ." 428 U.S. at 18.

[24] It is interesting to note that the beneficiary of the life insurance in the case, wife of the deceased, had been a partner in the business for which the credit was obtained, illustrating the over-inclusive protection afforded.

[25] A majority of the court found that this purpose—general improvement of retirement security—exceeded the scope of Congressional power under the Commerce Clause. 295 U.S. at 362. *But see id.* at 374 (dissenting opinion). We do not understand the plaintiff here to raise this objection.

Application of the factors relevant to judicial assessment of rationality, as distilled from these and other precedents, indicates that Title IV of ERISA satisfies Due Process. Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, *Allied Structural Steel Co.*, 46 U.S.L.W. at 4890-91; *Adams Nursing Home of Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977); whether the impairment of the private interest is effected in an area previously subjected to regulatory control, *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891, *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); the equities of imposing the legislative burdens, *Alton Railroad*, 295 U.S. at 354; *Turner Elkhorn Mining*, 428 U.S. at 19, and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *W.B. Worthen Co.*, 292 U.S. at 434; *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, they must only be used to determine whether the legislation represents a rational means to a legitimate end.[26] *See Turner Elkhorn Mining*, 428 U.S. at 18-19.

Congress determined that each year somewhere in the vicinity of 20,000 workers lost vested pension benefits due to causes beyond their control when a pension plan terminated.[27] Given that workers had "anticipated" that these vested benefits would provide retirement security, Congress viewed the termination losses as an abuse of the private pension system in need of correction. 29

[26] Although explicit consideration of these factors might suggest a risk of judicial usurpation of properly legislative judgments, failure to consider them might ultimately result in no meaningful scrutiny of the legislative process—a result prohibited by the Due Process Clause.

[27] *See* text and notes *supra* at 14-16 and note 32 *infra*.

U.S.C. § 1001(a). Thus, unlike the record before the Supreme Court in *Allied Structural Steel Co.*, here we have ample evidence that Congress perceived a widespread problem of national importance.[28]

An analysis of the retroactive burden imposed suggests that unlike the legislation in *Allied Structural Steel Co.*, *Worthen* and *Alton Railroad*, the burdens imposed by ERISA are rationally related to the Congressional purpose. It is true that the monetary measure of Nachman's potential liability cannot be characterized as insubstantial.[29] Further, Title IV of ERISA does displace reliance interests of the employer. If the employer had known that he would be liable for funding the insufficiencies upon termination of the plan, the company either would not have established the plan or perhaps would have utilized a more accelerated funding

[28] In *Allied Structural Steel Co.* the Court objected to the "extremely narrow focus" of the Minnesota statute. 46 U.S.L.W. at 4891. Moreover, the Court found the "only indication of legislative intent in the record" was represented by the Minnesota legislature's concern with one plan termination by White Motor Corp. *Id.* Finally the Court also notes that the Minnesota legislation had an extremely short effective life, since it was to become void on the effective dates of ERISA. *Id.* at 4891 n.21. This time limitation further belies the narrowness of the legislative purpose. None of these defects in the Minnesota scheme are applicable to ERISA.

Although the loss of pension benefits was not considered a national emergency by Congress, *Allied Structural Steel Co.*, confirms the prior precedents holding that retroactive liability can properly be imposed to remedy problems which fall short of an emergency. *Id.* at 4891 n.24.

[29] The Supreme Court in *Allied Structural Steel Co.*, stated that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage" under a Contract Clause analysis. 46 U.S.L.W. at 4890. The record evidence indicates that the average benefit subject to guarantee for Nachman's employees is $77 per month. The assets of the fund are only sufficient to provide an average monthly benefit of $27, thus subjecting Nachman to potential liability for amortizing the average benefit of $50 per month for 135 employees.

schedule.[30] In *Allied Structural Steel Co.*, the Supreme Court emphasized the gravity of altering an employer's obligation "in an area where the element of reliance was vital—the funding of a pension plan." 46 U.S.L.W. at 4891. However, the nature of the reliance interests in this case can be distinguished in several respects. First, the Minnesota statute imposed liability for payment of benefits to employees who, since they had not fulfilled service requirements, had no vested rights under the plan. Thus the Minnesota employer had a far greater reliance interest displaced than the only reliance displaced by Title IV—the belief that the company would not be liable for funding deficiencies in the event of a plan termination. The Minnesota employer had not funded the plan to ever accommodate payment of benefits upon completion of only ten years service, as the Act now required. This is the only reliance element emphasized by the Supreme Court in *Allied Structural Steel Co.*—an element not present in this case.[31]

The second and more important distinction in the nature of the reliance interests is that in this case Congress found that the employees' reliance interests in vested benefits outweighed the employer's reliance on prior funding. In *Allied Structural Steel Co.*, the Supreme Court specifically stated that, "[i]n some situations the element of reliance may cut both ways," but that "Minnesota did not act to protect any employee reliance interest demonstrated on the record." 46

[30] *See* D. McGill, Fulfilling Pension Expectations 276 (1962), concluding that if an employer were subject to liability for the payment of unfunded benefits, "sound financial management and realistic accounting practice would call for the funding on a current and actuarially determined basis of benefit credits not yet vested"—a practice apparently not typical of plans excluding employer liability upon termination.

[31] This aspect of differentiation with *Allied Structural Steel Co.*, will be eliminated for terminations which occur after December 31, 1975, since the minimum vesting requirements of Title I will then be in effect. We need not consider the constitutionality of Title I in this case since it is inapplicable here.

U.S.L.W. at 4891 n.18. The Supreme Court was unwilling to speculate that employees without any vested rights under the plan had any substantial reliance interests. Title IV, however, protects the reliance interests of employees in benefit rights which had vested under the pension plan, an interest which, *prima facie*, is stronger than interests in unvested rights. Moreover, this reliance interest is in fact demonstrated on the legislative record. Congress found that employees' expectations for retirement security were being defeated by plant closings and other causes beyond their control.[32] The third and final distinction in the reliance interests is that the expectation of the employer may also rationally be given less weight by Congress since pension plan terminations had previously been subject to federal regulation,[33] another element notably missing in *Allied Structural Steel Co.* 46 U.S.L.W. at 4891.

The basic equities of imposing the liability has also been relevant to the determination of whether the burden is irrational. In *Allied Structural Steel Co.*, and *Alton Railroad* the Court emphasized that the employer was being forced to pay added compensation for fully compensated services. The employers received no benefit in the bargain. In *Alton Railroad* the employer had never agreed to pay any retirement benefits. In *Allied Structural Steel Co.* the employer had agreed to pay retirement only if the employee served him for the requisite period of time—a time period not satisfied by nine of the eleven employees terminated. As the Supreme Court has noted, "the 'true nature' of the pension payment is a reward for length of service." *Alabama Power Co. v. Davis*, 431 U.S. 581, 593 (1977). Here, however, Nachman received the benefit he bargained for. The Nachman employees entitled to ERISA benefits in this case served Nachman for the requisite number of years required by the company under the terms of the plan and thus conferred the full benefit on the employer. In this case, then, the question Congress answered was not merely who should provide workers with retirement income, but who should bear the costs of a plan termination: a solvent employer who has received the full benefit he bargained for or the employee with vested benefit rights. As in *Turner Elkhorn Mining*, it was reasonable for Congress to conclude that this liability represented "an actual, measurable cost of . . . [the employer's] business." 428 U.S. at 19.

Perhaps the most important facts distinguishing ERISA from the Minnesota statute in *Allied Structural Steel* are those revealing the Congressional attempt to moderate the impact of the liability imposed. Title IV provisions represent a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose. Congress concluded that it was necessary to insure unfunded vested benefits and established a federal corporation for that purpose. However, it was also determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding.[34] III LEGISLATIVE HISTORY at 4741 (remarks of Sen. Williams); II LEGISLATIVE HISTORY at 3382 (remarks of Rep. Gaydos). Congress was also concerned that without

[32] The following paragraph represents perhaps the most succinct explanation contained in the Congressional record:

> Concern for loss of benefits by workers after long years of labor through circumstances beyond their control was similarly expressed by President Richard M. Nixon on December 8, 1971, when, in a message to the Congress he said, "When a pension plan is terminated, an employee participating in it can lose all or part of the benefits which he has long been relying on, even if his plan is fully vested. . . . Even one worker whose retirement security is destroyed by the termination of a plan is one too many."

II LEGISLATIVE HISTORY at 3296.

[33] The Internal Revenue regulations imposed numerous requirements on the format of private pension plans necessary to obtain favorable tax treatment. Included in those regulations was the mandate that all funded benefits be made nonforfeitable simultaneous with plan termination. Treas. Reg. § 1.401-6 (1963).

[34] *See* text and notes *supra* at 14-16.

the risk of liability, employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise. S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1155. It was also believed that to impose liability would cause employers to assume a more responsible funding schedule. II LEGISLATIVE HISTORY at 1873 (remarks of Sen. Griffin). These first two considerations would not have been relevant in the Minnesota scheme because no agency was established to assume primary responsibility for the payment of benefits.

Acknowledging that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance, Congress provided net worth limitations on the amount of potential liability. 29 U.S.C. § 1362. Congress also devised other provisions to temper the burdens imposed. Employers will not necessarily be liable for the full amount of benefits promised in the plan, since Congress set a level on the amount of benefits guaranteed. 29 U.S.C. § 1322(b)(3). In Section 1323 Congress required the PBGC to provide optional insurance to an employer who desires to protect against this contingent liability.[35] Finally, Title IV grants the PBGC discretion to arrange reasonable terms for the payment of liability. 29 U.S.C. § 1367. Thus Title IV of ERISA, unlike the statutes invalidated under Due Process or the Contract Clause does have "limitations as to time, amount, circumstances, [and] need." *W.B. Worthen*, 292 U.S. at 434.

The record supporting the enactment of ERISA, wholly unlike that present in *Allied Structural Steel*, demonstrates that "the presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' " *must* be allowed to govern here. 46 U.S.L.W. at 4891. *Turner Elkhorn Mining*, 428 U.S. at

[35] This protection would not have been available to Nachman since such insurance would have had to be in effect for 60 months. 29 U.S.C. § 1323(d).

18, 19; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Title IV of ERISA satisfies Nachman's rights to Due Process.

The order of the district court is reversed.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit